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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-204

BERNARD FEINBERG, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ABE FORTAS
FORTAS AND KOVEN
1200 - 29th Street, N.W.
Washington, D.C. 20007
Telephone: 337-5700

Attorney for Petitioner
BERNARD FEINBERG

Of Counsel:

PHILIP B. KURLAND
JOSEPH A. LAMENDELLA

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Petitioner, Bernard Feinberg, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 17, 1976. Petition for rehearing was denied by that court on July 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed a judgment entered after a bench trial, without jury, by the United States District Court for the Northern District of Illinois, Eastern Division, which found petitioner guilty on four counts of an

indictment under the federal Mail Frauds Statute (18 U.S.C. § 1341). Petitioner was sentenced to six months imprisonment on the first count of the indictment and to a suspended sentence and three years' probation on the remaining three counts. A condition of probation was that petitioner "make restitution" to the Treasurer of Cook County in the amount of $25,000. The judgment of the District Court appears as Appendix B to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This petition for writ of certiorari is filed within thirty days of the order of the Court of Appeals denying petitioner's petition for rehearing (July 12, 1976). The Court of Appeals granted a stay of its mandate pending this petition for certiorari.

QUESTIONS PRESENTED

1. Whether the four mailings in this case, or any of them, constituted a mailing "for the purpose of executing [a] scheme or artifice" to defraud within the meaning of the Mail Frauds Statute (18 U.S.C. § 1341)?

2. Whether the Mail Frauds Statute applies in a case where the claimed fraud was a misrepresentation to the Cook County Board of Appeals in a real estate tax reassessment proceeding, and the only mailings are a letter from petitioner-landlord to tenant asking that the former be sent the official notice of assessment (Count 1); a letter from tenant to landlord transmitting the notice (Count 2); and routine mailings, required by law, of two tax bills by the County Collector to the petitioner (Counts 5 and 6) sent several months after final, effective, unreviewable official action re-

ducing the assessment had been taken and personally communicated to petitioner—mailings which are entirely unrelated and unnecessary to the fraudulent scheme or to receipt of its fruits?

3. Whether the ruling of the Court of Appeals affirming petitioner's conviction is in conflict with this Court's decisions in *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645 (1974), *Parr* v. *United States,* 363 U.S. 370, 80 S.Ct. 1171 (1960), and *Kann* v. *United States,* 323 U.S. 88, 65 S.Ct. 148 (1944)?

4. Whether the exercise of federal jurisdiction in this case and of this type constitutes an unauthorized and unlawful use of federal power and of the federal judiciary and federal investigatory and prosecutorial forces solely to enforce violations of state and local law which is unwarranted by our Constitution?

STATUTORY PROVISIONS INVOLVED

The Mail Frauds Statute, 18 U.S.C. § 1341; Illinois Revised Statutes, Chapter 120, Section 578, Section 671. The Tenth Amendment of the United States Constitution. These appear as Appendix C to this petition.

STATEMENT OF THE CASE

The prosecution in the present case stemmed from petitioner's successful effort to obtain a reduction in Cook County assessment of the value, for purposes of 1971 County real estate taxes, of two buildings located in Chicago. The basis of the prosecution was the claim that petitioner, to obtain the reduction, falsified the date of a permit authorizing demolition of the buildings, which permit allegedly was in the file considered by the Cook County agency which granted the reduction in assessment.

No use of the mails, directly or indirectly, in connection with the proceedings for reduction of the assessment or the falsification of the date on the permit is charged or took place. The proceedings took only a few moments and were conducted entirely in the course of a personal appearance by petitioner. The agency's order was final and nonreviewable, and was handed to petitioner while he was in the offices where the proceedings took place.

In October 1970, the petitioner purchased two parcels of property in Chicago, Cook County, Illinois, described as 30-32 South Wells Street and 210-212 West Monroe Street. The buildings were from 40 to 83 years old and petitioner purchased the property with the purpose of demolition and redevelopment. (Tr. 226).[1]

Early in 1971, petitioner took steps looking towards vacation and demolition of the buildings. He discussed lease cancellations with tenants, and the record shows that as early as May 18, 1971, he reached a cancellation agreement with one tenant. (Tr. 77-78). Tenants began moving out in September 1971 (Tr. 27), and the buildings were entirely vacated shortly after Christmas of that year. (Tr. 24, 38, 52, 75). Petitioner discussed a contract for demolition with the National Wrecking Company, and received a proposal from them on July 1, 1971. (Tr. 135). A contract for demolition was made with the company on November 11, 1971. (Tr. 116). The wrecking company thereupon applied for a demo-

[1] References are to the typed transcript of the trial proceedings. Petitioner was an active and successful real estate developer in Chicago. The prosecution, on rebuttal, introduced evidence purporting to show that, at an earlier date and in another proceeding, petitioner had been responsible for an alleged change of date on a demolition permit. (Tr. 558-637). The admissibility of this evidence and its probative weight were disputed by petitioner in the lower courts.

lition permit which was issued on November 17, 1971. (Tr. 117). Interior wrecking then began (Tr. 137) and demolition was completed in February 1972. (Tr. 141).

The fraud on Cook County allegedly took place on February 2, 1972, in connection with a proceeding in which petitioner sought reduction of the assessment of the properties for the year 1971. The files before the agency personnel considering the matter allegedly contained demolition permits, the dates of issuance of which had been altered. Those permits had been issued on November 17, 1971, but the date of issuance shown on the copies in the files was June 17, 1971.[2] There is no evidence as to who changed the date or when.

The only evidence of mailings in the case, except for a subsequent and clearly inconsequential mailing of tax bills several months after the final, non-reviewable entry of the order reducing the assessed values, relates to only one of the buildings, the Monroe Street property. These mailings were two letters (Counts 1 and 2, App. E and F) between petitioner-landlord and the Monroe Street tenant: Count 1—On January 15, 1972, the petitioner wrote the tenant of the Monroe Street property asking the tenant to mail the notice of tax assessment to him when it was received; Count 2—On

[2] The evidence is disputed as to whether these permits were in the files when considered by the Hearing Officer or the Board Member. There is no evidence that the permits were altered by petitioner, and no evidence that he tendered the permits or caused them to be placed in the files. There is no finding on these matters. However, for purposes of the proceedings before this Court we shall assume that the claimed state fraud was proved against petitioner.

January 31, 1972, the tenant replied transmitting the notice.

The reason why petitioner wrote to the tenant is undisputed: On January 7, 1972, the tenant had written petitioner (App. D) stating that the Monroe Street building had been finally vacated on December 20, 1971, and advising petitioner of the tenant's computation of the prorated rents and charges for which the tenant was responsible. Petitioner's letter of January 15, 1972 (Count 1, App. E), was a reply to this letter, complaining of the tenant's proration; inquiring whether the tenant "had filed with the Assessor's Office to determine if a fair assessment was made against the property for 1971"; stating petitioner's "understanding that your company was to employ a tax counsel to handle this assessment matter"; asking whether "this was done"; and requesting "that immediately upon receipt of [the] official notice of assessment that it be sent on to me. . . ."

It is this letter that constitutes Count 1 of the indictment. Petitioner was convicted of a mail fraud felony on this count, as well as on three additional counts—in other words, it was held that this was a mailing "for the purpose of executing [a] scheme or artifice" to defraud. He was sentenced to six months imprisonment on this count. There is no evidence that the letter was part of a scheme to defraud. There is no other testimony or evidence that a plan to defraud existed at the time of the mailing of this letter or prior thereto, or indeed, prior to his personal appearance before the Board of Appeals on February 2, 1972. As the District Judge stated (App. B), this is a "document case."

On January 31, 1972, the tenant of the Monroe Street property, in a five-line letter, sent petitioner the notice

of assessed valuation as to the Monroe Street building. (App. F). This constitutes Count 2 of the indictment, upon which petitioner was also convicted of a felony and received a suspended sentence.

The record contains no evidence whatever as to mailings or receipt of the notice of the assessment with respect to the Wells Street property. Petitioner undoubtedly received the notice by mail as a result of required Illinois procedures. Chapter 120, *Illinois Revised Statutes*, Section 671. Presumably receipt of this notice was not charged as an offense because receipt of a notice of assessment obviously does not meet the statutory requirement that the mailing be "for the purpose of executing [the] scheme," and because it is merely a routine, required, official act. (See *infra; Parr* v. *United States,* 363 U.S. 370, 391, 80 S.Ct. 1171, 1183 (1960)). But there is no logical or legal distinction between such a mailing, for purposes of the Mail Frauds Statute, and the receipt of a notice of assessment by otherwise innocent correspondence between a landlord and tenant.

These two letters (App. E and F) are the only mailings upon which jurisdiction under the Mail Frauds Statute is claimed, except for the formal, legally required mailings by the Tax Collector for the tax bills in April 1972—months after the reduction of assessment had finally, unreviewably, been granted by the Board of Appeals and the order of reduction had been given to petitioner. These mailings cannot possibly be justified as a basis of conviction under the Mail Frauds Statute. See *infra* and *Parr* v. *United States,* 363 U.S. 370, 391, 80 S.Ct. 1171, 1183 (1960).

On February 2, 1972, petitioner proceeded personally to the offices of the Board of Appeals for Cook County

which has jurisdiction over "complaints" with respect to property assessments. Petitioner there filled in a complaint form for each of the properties and received an "instant hearing" provided for in the procedures of the Board. (App. G and H). The files before the Hearing Officer and Board presumably included the demolition permits which had been issued on November 17, 1971, but the dates of issuance had been changed to June 17, 1971. (App. I and J).

Each complaint (App. G and H) recited "building vacated for demolition—buildings on premises wrecked." Under the heading "Full description of buildings on property," the complaints recited "five-story loft building that was vacated and wrecked." These statements were true as of the date when the complaints were made and filed (February 2, 1972).

The officials of the Board of Appeals did not question petitioner and made no investigation of any sort.[3] The entire consideration of the matter by both the Hearing Officer and the Board Member lasted only a few minutes. The Board forthwith ordered that the assessed value of the properties for the complete year of 1971 be reduced by the entire value of the buildings, although the only "evidence" before them—the wrecking permits as altered—was dated June 17, 1971, which would indicate that the buildings were intact prior to that date—i.e., for over half of the taxable year. The evidence is clear that even without the assistance of the altered wrecking permits, petitioner would have been entitled to a reduction in the assssed value of the buildings of at least 80%.[4]

[3] The casual nature of the proceedings before the Board of Appeals and the obvious failure to apply any standards to the disposition of the complaints illustrates the mischief of, in effect, transferring jurisdiction to the federal government under the Mail Frauds Statute. It is not inconceivable that if enforcement responsibility were squarely left to the State of Illinois, the need for corrective measures, which can be taken only by the state or county, would be dramatized. This is the substance of Mr. Justice Black's wise admonition against the use of federal jurisdiction to relieve the states of the necessity to police their own processes. *Rutkin* v. *United States*, 343 U.S. 130, 142-143, 72 S.Ct. 571, 578-579 (1952), see *infra*.

The decision of the Board of Appeals, under Illinois law, is final and unreviewable. Chapter 120, *Illinois Revised Statutes,* Section 578. (App. C).

While petitioner was still in the Board's offices, he was handed the notice of reduction of assessed value. (Tr. 466, 472). Thereafter, the routine procedure prescribed by law was followed by the County personnel. The required ministerial action was taken by the Cook County tax officials, and several months later, in April 1972, the formal, first-installment, tax bills were sent by mail to petitioner. These formal notices are charged as separate Mail Frauds offenses (Counts 5 and 6).[5] The

[4] The Board Member, a Government witness who passed on petitioner's complaints, testified that "most buildings that are going to be wrecked have absolutely no value" (Tr. 344, 345); "A building can actually become a negative value to the land. The land is worth more with the building off". (Tr. 347). An expert testified that these buildings "added nothing to the value of the land" (Tr. 524); that the one property was "worth more dead than alive" and the other was "worthless or worse than worthless". (Tr. 527, 528). The Board Member further testified that "if it had been in November," he would have adjudicated the assessed value at "somewhere between 10 and 20 percent of its—of the value of the building." (Tr. 349-350).

[5] The record also contains the tax bills for installments due in September. On the prosecution's theory, sustained by the courts below, these, too, could have been charged as separate offenses under the Mail Frauds Statute, and could have exposed petitioner to the

formal tax bills are the only mailings in addition to the two letters described above, upon which jurisdiction under the Mail Frauds Statute is claimed to support the felony conviction. They were of no operative effect. They are formalities required by law. (Chapter 120, *Illinois Revised Statutes,* Section 671 (App. C)).

There was no power in any official to alter the decision of the Board of Appeals. The Illinois statute provides that "The assessor shall have no power to change the assessment or alter the assessment books in any other manner or for any other purpose so as to change or affect the taxes in that year, except as ordered by the board of appeals. The county assessor shall make all changes and corrections ordered by the board of appeals." (Chapter 120, *Illinois Revised Statutes,* Section 578 (App. C)).

Even assuming that the total reduction in the assessed value of the buildings was the fruit of taxpayer's alleged fraud, he benefited by approximately $27,500: $24,000 on the Monroe Street building and $3,500 on the Wells Street building. As testified to by the Board Member who passed on petitioner's complaint, absent the fraud, since the buildings were scheduled for demolition, their value without reference to actual demolition, would have been assessed at no more than 10% or 20%. (Footnote 4, *supra*; Tr. 349-350). On this basis, petitioner would have been entitled to a reduction of at least 80% of the assessed value and his maximum benefit from the alleged fraud would have been $5,500.

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hazard of a $1000 fine and five-year imprisonment on each additional tax bill.

The claimed fraud was punishable under state law;[6] but as a result of the interposition of federal prosecution, under a tenuous and, in our view, unlawful application of the federal Mail Frauds Statute, petitioner was prosecuted in the federal courts and subjected to the hazard under the Mail Frauds Statute of a fine of $1,000 and five years' imprisonment on each of the counts. He stands transmuted from a respectable businessman and citizen to a convicted felon consigned to a six-month term in the federal penitentiary and to the deprivation of rights attendant upon his status as a convicted felon.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. In this Court, we present only a single issue which we believe to be of great importance (a) in the administration of justice, because of the great burden upon the federal courts and agencies charged with administration of federal criminal laws which results from the misuse of the Mail Frauds Statute, and (b) in halting the "Federal encroachment upon local criminal jurisdiction [which] can also be very injurious to the states."[7]

In essence, the issue presented is whether prosecution under the Mail Frauds Statute requires a *genuine* use of the mails—i.e., "for the purpose of executing [a] scheme or artifice" to defraud—or whether any re-

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[6] The alleged scheme clearly could have been prosecuted under provisions of the Illinois Criminal Code, Chapter 38, *Illinois Revised Statutes,* Section 17-3 (Forgery) and Section 32-8 (Tampering with Public Records).

[7] See the eloquent statement of Mr. Justice Black, in dissent, speaking for himself and Justices Reed, Frankfurter and Douglas. *Rutkin* v. *United States,* 343 U.S. 130, 142-143, 72 S.Ct. 571, 578-579 (1952).

mote, tangential mailing, even though it played no role in and was no part of the scheme to defraud or to receive its fruits, is sufficient to call the statute into play, consume the time and attention of federal prosecutors, agents, and the federal judiciary, and to add to the already intolerable burden of the federal courts, relieving the states of their clear-cut duty to administer their own laws.

The federal Mail Frauds Statute as demonstrated by its history, explicit language and the interpretive decisions of this Court, is designed to deter and punish the improper use and abuse of a federal instrumentality, the mails. It is not designed to displace or enforce state laws or procedures, or to relieve the states of the right and duty to prosecute local offenses. The Mail Frauds Statute should not be invoked unless the offense involves a use or abuse of a federal instrumentality, the mails, that is an operative part of "executing [the] scheme or artifice" to defraud.

2. This principle underlies the rulings of this Court in a number of cases. This Court has repeatedly held that where the fraud was completed, where its aims were completely achieved prior to the charged mailings, and where the consummation of the scheme was achieved independently of those mailings, the Mail Frauds Statute does not apply. As stated in *Kann* v. *United States,* 323 U.S. 88, 65 S.Ct. 148 (1944), the "use of the mails [must be] part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law" (checks cashed and money received prior to and independent of the mailings).[8] This

[8] In *Kann*, this Court stated:

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S. 88 at 95, 65 S.Ct. 148 at 151.

is also the principle of the decision in *Parr* v. *United States,* 363 U.S. 370, 80 S.Ct. 1171 (1960) (mailings of tax bills were unrelated to the misuse of school district funds and were required by law; and the fraudulent act of obtaining gasoline and supplies for personal use on official credit cards was consummated prior to and independent of the mailings); and *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645 (1974) (fraudulent use of credit cards to obtain rental of motel rooms and goods and services was consummated prior to and independent of the mailings).[9]

This principle disposes of the present case and requires reversal of the decision below—an action which, if taken by this Court, will furnish sorely needed guidance to federal courts and prosecutors who are now engaged in the handling of hundreds of prosecutions

[9] We are not aware of any decision of this Court which sustains the application of the Mail Frauds Statute in circumstances similar to those here presented. *Pereira* v. *United States,* 347 U.S. 1, 74 S.Ct. 358 (1954), urged by the prosecutor below but not cited by the Court of Appeals, involved a mailing which was an essential part of the scheme: As part of his plot to obtain money from a widow, defendant not only married her but caused her to sell securities that she owned in Los Angeles and to have the check mailed to Texas where he cashed it. This mailing was obviously an integral and necessary part of the scheme to defraud. In all other cases in which this Court has sustained Mail Fraud convictions, the mailings were similarly necessary steps in the fraudulent scheme. See, e.g., *United States* v. *Sampson,* 371 U.S. 75, 83 S.Ct. 173 (1962) (mailing consisted of the "accepted" application form, an integral part of the scheme); *United States v. Comyns,* 248 U.S. 349, 39 S.Ct. 98 (1919); *United States v. Kenofskey,* 243 U.S. 440, 37 S.Ct. 438 (1917).

under the Mail Frauds Statute. (See *Reports of the Attorney General, infra*).

3. Counts 5 and 6 of the present indictment, under which petitioner was convicted, are squarely at odds with precise holdings of this Court. Those counts charge, as offenses under the Mail Frauds Statute, the mere receipt by petitioner of official, formal notices of his tax bills in April 1972, about three months after petitioner had obtained the final, nonreviewable reduction of his tax assessment by the Board of Appeals. The mailing of the notices was an act which Illinois law required of the Cook County Collector (Chapter 120, *Illinois Revised Statutes,* Section 671) and the alleged scheme had long been completed before the tax bills were mailed and petitioner had received the object of his alleged scheme. Such mailings cannot be charged as an offense under the Mail Frauds Statute. This is the square, recent holding of this Court in *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645 (1974). This is also the holding of *Parr* v. *United States,* 363 U.S. 370, 80 S.Ct. 1171 (1960).

4. Although the principle upon which petitioner relies is reiterated in this Court's decisions, the Court has not squarely decided the issue presented by Counts 1 and 2 in the present case—an issue which recurs in numbers of mail fraud prosecutions at the investigatory, prosecutorial and judicial level. In essence, the question is whether practically *any* type of mailing, however remote, incidental, inconsequential or unrelated to the fraudulent scheme, can be the basis of prosecution under the Mail Frauds Statute or whether there must be a mailing which is genuinely related to

the execution of the scheme, in order to satisfy the requirement of the statute that the mailing must be "for the purpose of executing [the] scheme." The facts of this case vividly illustrate the all-too-common practice of using inconsequential mailings, unrelated to the fraudulent scheme, to invoke federal jurisdiction in local matters.

a. Counts 1 and 2 charge as offenses the letters between petitioner and the tenant of the Monroe Street building asking for and receiving the notice of assessment. The letters (App. E and F) cannot be regarded as a "part of the execution of the fraud" (*Kann, supra*), or as a step in its consummation. They show that petitioner was vitally interested in the assessment. The trial judge found this, and only this. He found that "when Mr. Feinberg wrote the letter which is the subject of Count 1, that the scheme had developed, that *he wanted the assessment.*" (App. B). It is meaningless that "the scheme had developed" to the point that petitioner "wanted the assessment." The only possibly material fact was whether the scheme had developed to the point where petitioner had formulated his fraudulent design; and even so, it would also have to be found that the request that the tenant send him the notice of assessment was a step in the execution of that fraudulent design. The trial judge did not find—and could not have found—that petitioner then intended to seek a reduction by fraudulent means, nor did he find, nor could he have found, that the mere solicitation and receipt by mail of the notice of assessment was "a step in a plot" (*Badders* v. *United States,* 240 U.S. 391, 394, 36 S.Ct. 367, 368 (1916), quoted in *Parr, supra,* 363 U.S. at 390, 80 S.Ct. at 1183), or that

they were, in the language of the Statute, "for the purpose of executing [the] scheme".[10]

b. In fact, the text of the letters (see *Facts, supra*) negates any inference that they were in implementation of or were part of a scheme to obtain a reduction of assessment by fraud. The text of petitioner's letter indicates precisely the opposite. It recites that he understood that the *tenant* "was to employ a tax counsel to handle this assessment matter," and he asked the tenant, "Please advise me if this was done". (App. E). It was, in fact, no more than a request for information as to what, if anything, the tenant had done with respect to the assessment and a request that the notice of assessment be sent to petitioner when received by the tenant. It discloses that petitioner, when he wrote the letter, did not even know the amount of the increase. It stated only that petitioner had learned unofficially of "an increase" and he did "not know what the real estate valuation could have been increased to. . . ."

c. Petitioner made no use of the notice of assessment and the record is clear that it was totally unnecessary for petitioner to have the notice in order to protest the assessment. He was not required to, and did not, present it for purposes of the protest proceedings. (Tr. 218). In fact, he could have ascertained the amount of the assessment without having the notice in hand. The amount of the assessments had been published, as required by law, in "several newspapers" of general circulation on January 12, 1972, which was three days prior to the date of petitioner's letter

[10] In fact, as discussed *supra*, petitioner had a clear case, without reference to the alleged fraud, entitling him to a major reduction of the assessment on both properties.

(Count 1); and information as to the amount of the assessment could be obtained from the assessor's office. (Tr. 226, 227, 372, 374). Petitioner was experienced in real estate and assessment matters and it may be assumed that he was aware of these facts. (Tr. 393). In any event, obtaining the notice certainly served no purpose in the execution of any scheme, nor is it reasonable or consistent with the text of the letter to assume that petitioner thought it did or that he sought the notice for any purpose related to the "executing of the scheme."

d. The letters played absolutely no part in the alleged scheme: They were communications between petitioner and the tenant; they had nothing to do with the taxing authorities; they were totally without role or function with respect to the "execution" of the alleged scheme. Indeed, if the notice of assessment had been solicited and received directly from the County authorities, they could not and presumably would not have been charged as offenses. (See page 7, *supra*). There is nothing in the text of the letters, and certainly no evidence, to indicate that the transmission of the notice of assessment is of any more significance than if it had been received by petitioner as a result of a mailing from the County officials.

5. There is and can be no doubt that this, like many other investigations and prosecutions under the Mail Frauds Statute, was the use of federal personnel and power solely to punish an individual for violation of a state law. It served no federal purpose. The danger of political motivation, involving federal officials in state administration is, of course, always present; but apart from that possibility, the use of federal power to

prosecute in the absence of a genuine federal offense defined by Congressional enactment, is not only highly undesirable, but a violation of our fundamental conceptions of federal-state relationships. (See Mr. Justice Black, *supra,* footnote 7). It is in contravention of the Tenth Amendment to our Constitution which reserves to the states the powers not delegated to the United States. The delegated powers of the United States do not include jurisdiction over a false statement made to a minor Cook County board in the course of a personal appearance to seek a reduction of the assessed value of real estate. This is a state, and not a federal, matter.

6. The decision below is in conflict with this Court's rulings in *Maze, Parr* and *Kann, supra.* The opinion of the Court of Appeals (App. A) does not even attempt to distinguish these cases. As stated by this Court in *Parr,* 363 U.S. at 393-94, 80 S.Ct. at 1185:

> "[T]he showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." 363 U.S. at 393-94.

7. The importance of this Court's review of the present case and of a decision by this Court on the questions presented is dramatically shown by the fact that in the year 1974, the Department of Justice filed 750 cases charging "mail and wire fraud," and in 1973, it filed 663 such cases. (*Annual Report of the Attorney General,* 1975 at p. 17, 1974 at p. 12). While

precise information is unavailable, we believe that a significant number of these prosecutions involve the same type of unjustified and unlawful reliance on mailings which, like the present mailings, are so unrelated, or so remotely and tenuously related, to the fraudulent scheme that they do not meet the basic requirements of the Mail Frauds Statute; that they must be "for the purpose of executing" the fraudulent scheme.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ABE FORTAS
FORTAS AND KOVEN
1200 - 29th Street, N.W.
Washington, D.C. 20007
Telephone: 337-5700

Attorney for Petitioner
BERNARD FEINBERG

Of Counsel:

PHILIP B. KURLAND
JOSEPH A. LAMENDELLA

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1762

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

BERNARD FEINBERG, *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
No. 73 CR 370

PRENTICE H. MARSHALL, *Judge*

ARGUED JANUARY 8, 1976—DECIDED MAY 17, 1976

Before FAIRCHILD, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and EAST, *Senior District Judge.**

EAST, *Senior District Judge.* The defendant-appellant Bernard Feinberg (Feinberg) appeals from his judgment of conviction and sentence to custody on one count and suspension of sentence on three counts of violating 18 U.S.C. § 1341 (mail fraud). We affirm.

Indictment and Trial

The indictment charged that from November, 1971 to June, 1975, Feinberg illegally schemed to defraud the citizens of Cook County, Illinois of moneys due for taxes on property located at 30-32 South Wells Street, Chicago,

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Illinois (Wells Street) and at 210-212 West Monroe Street, Chicago, Illinois (Monroe Street) in that he willfully and knowingly misrepresented to the Cook County Board of Appeals the date on which buildings on those two properties were demolished and, through those misrepresentations, induced them to reduce the assessed value of the respective properties, resulting in a lower tax bill. The indictment further charged that six separate items were sent through the United States mail in furtherance of Feinberg's illegal scheme. Each mailing furnished the basis for a count.

Feinberg was tried to the District Court, sitting without a jury, and found guilty as charged on Counts One, Two, Five and Six and acquitted on Counts Three and Four.

Issues on Appeal

We deem the pertinent issues on review to be:

1. Did the District Court err in concluding that there was sufficient evidence to deny Feinberg's motion for acquittal at the end of the Government's case-in-chief and to convict Feinberg at the conclusion of the entire case?

2. Did the District Court err in allowing the Government to introduce for the first time evidence of Feinberg's past similar conduct during rebuttal?

3. Is the "mail fraud" statute, 18 U.S.C. § 1341, as judicially construed, void for vagueness?

Facts

The pertinent facts appearing in the Government's case-in-chief are:

Feinberg was a partial beneficial owner, as a conditional sales vendee in possession under several written executory contracts of sale, of the two parcels of land designated as 30-32 South Wells Street (Wells Street) and 210-212 West Monroe Street (Monroe Street) in the City of Chicago,

Illinois, upon which were located several buildings used for rental investment purposes. Those buildings were intact and partially occupied, and the tenants paid Feinberg substantial amounts of rent through December, 1971.

During November, 1971, Feinberg contracted with National Wrecking, a company engaged in building demolition, for the wrecking of the buildings upon the Wells Street and Monroe Street parcels. City of Chicago permits for the demolition were issued on November 17, 1971. The permits were delivered to National Wrecking. They proceeded with the demolition work by first stripping the buildings, removing readily marketable salvage. The stripping work continued while parts of the four buildings were still partially occupied. Actual demolition of the walls of the buildings on the two parcels commenced and was completed during the month of February, 1972.

The Diversey Corporation, an international manufacturing concern with headquarters in Chicago, (Diversey) was the conditional sales vendor under the existing executory contract of sale of the Monroe Street parcel. Under date of January 15, 1972, Feinberg mailed a letter over his signature in the United States mails to a Mr. F. E. Horn, a Vice President of Diversey, stating, *inter alia:*

> "Your company will be receiving within a week to ten days an official notice from the Cook County Assessor's Office as to the 1971 assessment on land and building. I have been informed unofficially that the land value has doubled on this property and I do not know what the real estate valuation could have been increased to if there was no one watching the assessment procedure on behalf of your company . . . also note your records that immediately upon receipt of this official notice of assessment that it be sent on to me so that we may within the prescribed time set by law file an assessment complaint on any over assessment that may have taken place."[1]

[1] This letter was the subject of Count One of the indictment upon which Feinberg was found guilty.

On January 31, 1972, Diversey mailed to Feinberg via the United States mails the Cook County Assessor's notice of assessed valuation on the Monroe Street property showing an increased 1971 assessed valuation for the improvements (building) in the amount of $202,843.[2]

On February 2, 1972, Feinberg personally presented at the Office of the Real Estate Board of Appeals for Cook County, Illinois (Board)[3] over his signature two separate 1971 Real Estate assessed valuation complaints.

The first complaint alleged an over-assessment on the Monroe Street property in the amount of $200,000 for the reason "Building vacated for demolition—buildings on premises wrecked." The Board's file jacket labeled "1971 Real Estate Board of Appeals" and numbered 2511 under date of February 2, 1972 under the name of Bernard Feinberg, in evidence, contains, *inter alia:*

> The mentioned complaint signed by Feinberg;
>
> City of Chicago building permit for "work at: 210-12 W Monroe St, X Wreck One 5 Sty. Building," and bearing the *approved date of "Jun 17 1971"* (italics supplied);
>
> Hearing Officer Stark's "*Findings:* Vacant land only. Land increased 50% without notice"; and
>
> Notation of the Board's action on the reverse of the complaint: "Bldg Wrecked Remove" and a decrease of total valuation in the amount of "202843" with the further notation "Final Action Transmitted Feb 9-1972 to the County Assessor."

The second complaint alleged an over-assessment on the Wells Street property in the amount of $26,615 for the

[2] The mailing of this notice of assessment constituted the mailing charge in Count Two of the indictment upon which Feinberg was found guilty.

[3] Included among the Board's functions is power to review of real estate assessments made by the Assessor upon petition by a taxpayer.

reason "Building vacated for demolition—buildings on premises wrecked." The Board's file jacket labeled "1971 Real Estate Board of Appeals" and numbered 2512 under date of February 2, 1972 under the name of Bernard Feinberg, in evidence, contains, *inter alia:*

> The mentioned complaint signed by Feinberg;
>
> City of Chicago building permit for "work at: 30 S. Wells, X Wreck One Sty. Building," and bearing the *approved date of "Jun 17 1971"* (italics supplied);
>
> Hearing Officer Stark's "*Findings:* Vacant land only. Land increased 50% without notice"; and
>
> Notation of the Board's action on the reverse of the complaint: "Bldg Wrecked" and a decrease of total valuation in the amount of "26615" with the further notation "Final Action Transmitted Feb 9-1972 to County Assessor."

Feinberg did not in either instance present to or advise the Board of the City of Chicago's wrecking permit issued November 17, 1971, under which National Wrecking performed the demolition work as above mentioned.

Notice of the Board's deletion of the assessed valuation of the improvements on the Wells Street and Monroe Street properties respectively was in due course sent to Feinberg.[4]

In April, as required by law, the Cook County, Illinois Treasurer mailed to Feinberg via United States mails official tax bills, as computed on the reduced 1971 assessed valuations on each property. Feinberg paid the taxes as billed during 1972.

The amount of taxes billed and paid, but for the deletion of the assessed valuations for the improvements ob-

[4] These two notices were charged as the mailing in Counts Three and Four of the indictment. However, the District Court was not satisfied with the proof of mailing and acquitted Feinberg on those two counts.

tained by Feinberg as above outlined, would have been in the increased amounts of $24,000 on the Monroe Street property and $3,500 on the Wells Street property.

Discussion

Issue 1:

Feinberg raises four "sufficiency of the evidence" sub-issues:

1. Does the trial court, in a bench trial, have to find evidence "sufficient to sustain a conviction" (Fed. R. Crim. P. 29(a)) before it can deny a motion for acquittal at the close of the Government's case-in-chief?

2. In a bench trial, does evidence "sufficient to sustain a conviction" mean proof beyond a reasonable doubt as to the defendant's guilt?

3. Was the evidence "sufficient to sustain a conviction" at the close of the Government's case?

4. Was the evidence "sufficient to sustain a conviction" at the close of the entire case?

We conclude these four related issues to be without merit. The Circuit Court, in ruling upon Feinberg's motion for acquittal at the close of the Government's case, observed that "the evidence must be viewed in the light most favorable to the Government," and concluded: "I believe that the evidence that has been submitted is sufficient to go to a jury on all six Counts. So the motion for judgment of acquittal at the close of the Government's case will be denied."

The District Court in considering Feinberg's motion adopted the correct standard of taking the Government's evidence in the light or aspect most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); and *United States* v. *Velasco*, 471 F.2d 112, 115 (7th Cir. 1972). The same standard "applies to a case

tried to a District Judge as well as to a case tried to a jury." *United States* v. *DeNiro*, 392 F.2d 753, 756 (6th Cir. 1968).

Feinberg's attack on the sufficiency of the evidence to sustain his conviction is two pronged:

(a) A scheme to defraud was not established, because he could have established and be entitled to an assessed valuation and resulting tax reduction for reasons other than the demolition of the buildings. It is immaterial and of no consequence that Feinberg may have been able to acquire a similar reduction in the amount of taxes payable on the properties respectively through some honest means. That Feinberg did acquire the specific deletion of assessed valuations and resulting reduction of taxes on the property by means of fraud and deceit is indisputably established by the record. *See, e.g., United States* v. *New South Farm & Home Co.*, 241 U.S. 64 (1916).

(b) The documents purporting to be the City of Chicago wrecking permits bearing the date of "Jun 17 1971" were erroneously received in evidence and the testimony of the Government's witness Semrow, a deputy in the Board's office, regarding the documents delivered and representations made to him by Feinberg in connection with Feinberg's over-assessment complaints was "inherently unbelievable."

Feinberg's reliance upon the rationale of *United States* v. *Panczko*, 353 F.2d 676 (7th Cir. 1965); and 2 Morgan, Basic Problems of Evidence, as to the inadmissibility of the wrecking permit documents is misplaced. A perusal of those authorities manifestly reveals that they are inapposite.

It is Hornbook law that the District Court, as the trier of the facts, is the sole judge of the credibility of the witnesses and the weight of their respective testimony. This court will not review that determination in light of

the District Court's correct determination of the quantum of sufficient evidence at the close of the Government's case. *Glasser, supra* at 80; *United States* v. *Crumble,* 331 F.2d 228, 230 (7th Cir. 1964); *United States* v. *Zimmerman,* 326 F.2d 1, 3 (7th Cir. 1963); and *United States* v. *Bakes,* 354 F.2d 640, 641 (7th Cir. 1966).

Included within "sufficiency of the evidence" issues is Feinberg's assertion that there is no proof of any use of the United States mails in the execution of the alleged scheme to defraud. That assertion is without merit since it is based upon the invalid premise that the mailed items are "innocent" in that they contain no misrepresentations. *See Badders* v. *United States,* 240 U.S. 391, 394 (1916).

Feinberg also asserts that the two mailings of the tax bills were not of the type to sustain conviction because:

(a) The mailings were made after the completion of any scheme to defraud; and

(b) The mailings were required by law to be made.

We reject each of those two assertions. Feinberg's reliance upon *United States* v. *Maze,* 414 U.S. 395 (1974); *Kann* v. *United States,* 323 U.S. 88 (1944); *Parr* v. *United States,* 363 U.S. 370 (1960); and *United States* v. *Staszcuk,* 502 F.2d 875 (7th Cir. 1974), is wanting under the facts in this case. The indictment charges a scheme to obtain by fraud a reduced tax bill. The end result of the scheme to defraud was the ultimate obtaining through the mails of a statement of an amount of taxes payable in an amount less than the amount that would have been due but for the successful operation of the scheme and the mailings Feinberg caused to be done in the furtherance of the scheme. The agents of the Cook County Tax Collectors Office are not under charge of fraud for the mailing of the tax bills. It was Feinberg's scheme to bring about the official mailing of the fruit of his crime. *See United States* v. *Smothers,* 435 F.2d 209 (7th Cir. 1970), *cert. denied,*

403 U.S. 906 (1971); and *United States* v. *Williams,* 424 F.2d 344 (5th Cir. 1970).

We conclude that the record as a whole contains ample relevant evidence to support the District Court's findings of guilty beyond a reasonable doubt.

Issue 2:

This issue arises from the District Court's admission during the Government's presentation of rebuttal evidence to the effect that during the Fall of 1971, Feinberg endeavored to perpetrate a scheme to defraud the Board nearly identical to that employed in the instant case, *viz.:* original documents, the Board's files reflecting wrecking permits with altered dates for the wrecking of a building at 4635 Lawrence Avenue in Chicago on October 14, 1971, and lay and expert testimony regarding the false documents and representations.

Feinberg urges that the rebuttal evidence was improperly received in that:

(1) The proffered evidence was not relevant on the issue of intent or *modus operandi;* and

(2) Such evidence was inappropriate material for rebuttal.

We conclude that the District Court did not err in receiving the challenged evidence. It is well established that evidence of prior criminal acts is admissible on the issue of a defendant's specific criminal intent if (1) the prior act is similar enough and close enough in time to be relevant, (2) the evidence of the prior act is clear and convincing, (3) the probative value of the evidence outweighs the risk of prejudice, and (4) the issue to which the evidence is addressed is disputed by the defendant. *See United States* v. *Ostrowsky,* 501 F.2d 318 (7th Cir. 1974); *United States* v. *Hampton,* 457 F.2d 299 (7th Cir.), *cert.*

denied, 409 U.S. 856 (1972); *United States* v. *Fierson*, 419 F.2d 1020 (7th Cir. 1969).

It is difficult for us to envision a more similar in approach and in the time sequence in placing several schemes to defraud into operation than the incidents charged in the indictment and that involved in the challenged rebuttal evidence. The first element is manifestly satisfied. The requirements that the proffered evidence be clear and convincing and that its prejudicial impact be outweighed by its probative value, Items (2) and (3), *supra*, are amptly satisfied under the test of *Ostrowsky* at 323.

Feinberg, during his defense-in-chief, placed into evidence testimony suggesting both that Feinberg had not put the falsified documents in the files, and his intent in seeking the tax reduction was not criminal; thus the dispute of Feinberg's intent became defined. The precise issue to which the evidence of common scheme was relevant was then clearly in dispute and, under the rationale of *United States* v. *Fearns*, 501 F.2d 486 (7th Cir. 1974), the evidence was admissible.

The Government, following the cautionary rationale of *United States* v. *Gaus*, 471 F.2d 495 (7th Cir.), *cert. denied*, 412 U.S. 938 (1973); and *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965), waited until the issue of intent was "sharpened" by Feinberg's evidence and then utilized the vehicle of rebuttal for the introduction of the evidence.

Issue 3:

18 U.S.C. § 1341, as applied in the multi-count indictment, is not unconstitutional for vagueness or otherwise. *Badders* v. *United States*, 240 U.S. 391 (1916); *United States* v. *Hannigan*, 303 F. Supp. 750 (D. Conn. 1969); *United States* v. *Attaway*, 211 F. Supp. 682 (D. La. 1962); and *United States* v. *Gartman*, 145 F. Supp. 420 (D. Pa. 1956).

The District Court's judgment of conviction and sentence entered on June 27, 1975 is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Judgment of the Court

June 25, 1975

(Transcript pp. 674-676)

THE COURT: Mr. Lamendella, Mr. Feinberg, Mr. Lydon.

Gentlemen, I have reviewed all of the exhibits in the case as well as my notes of the testimony. I concur with Mr. Starkman's observations in closing argument yesterday that in many respects this is essentially a document case.

I think the beginning point in a case such as this is the alleged scheme, the existence of it or the nonexistence of it, defendant's participation in that scheme, and the defendant's state of mind at the time of participation. If the first two conditions are established—that is to say, whether there is sufficient evidence to show beyond a reasonable doubt that he knowingly, intentionally, willfully and with intent to defraud participated in the scheme.

The defendant is entitled to the presumption of innocence by law, by philosphy [sic] and by my own commitment as a Judge. In a case in which the evidence is entirely circumstantial, as it is here, although the test has been subjected to some criticism, he is also entitled, I think, to the assertion that if the evidence can be construed in any way consistent with innocence, it should be—the double hypothesis test.

As I review all of the evidence in the case, I am convinced beyond any doubt, beyond a reasonable doubt, that Mr. Feinberg knowingly, intentionally, willfully engaged in a scheme to defraud as alleged in the indictment; that he submitted false documents to the Board of Appeals as alleged in the indictment, so that the existence of the scheme and his involvement in it are established.

What remains are the mailings. Counts 1 and 2 have been clearly proved beyond a reasonable doubt. The question is whether they were in furtherance of the scheme.

I believe the evidence supports a finding beyond a reasonable doubt that the scheme began sometime late in 1971, very early in 1972, perhaps even earlier than that. It is always difficult to pinpoint it. But I think when Mr. Feinberg wrote the letter—I shouldn't say I think, I find beyond a reasonable doubt when Mr. Feinberg wrote the letter which is the subject of Count 1, that the scheme had developed, that he wanted the assessment.

Sure, there are other matters covered in the letter. He wanted the assessment notice. He believed he needed it or that it was desirable in order for him to proceed to obtain the reductions, and the answering letter likewise was in furtherance of the scheme.

Insofar as Counts 3 and 4 are concerned, the proof is in a sufficient state of disarray, and understandably so, when you are dealing with a public office the nature of the Board of Appeals—the proof is in a sufficient state of disarray that I could not in good conscience find beyond a reasonable doubt that the notices of reduction were mailed in this case.

Insofar as Counts 5 and 6 are concerned, there isn't any dispute that they were mailed. There isn't any dispute that they culminated the scheme. There is a serious legal question with respect to whether they fall within the Paar [sic] doctrine, but I do not believe as a matter of law they do.

There will be a finding of guilty in the manner and form charged in the indictment as to Counts 1, 2, 5 and 6; findings of not guilty as to Counts 3 and 4. Judgment will enter on the findings.

APPENDIX C

§ 1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, *for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon,* or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, *shall be fined not more than $1,000 or imprisoned not more than five years, or both.* June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94. [Emphasis added.]

CHAPTER 120—ILLINOIS REVISED STATUTES

SECTION 578

578. Revision by county assessors. § 97. In Counties having a population of 1,000,000 or more inhabitants, the county assessor shall have authority annually to revise the assessment and correct the same as shall appear to him to be just, and on complaint in writing in proper form by any taxpayer, and after affording such taxpayer an opportunity to be heard thereon, he shall do so at any time before the assessment is completed and verified. On any such revision by the county assessor, except where such revision is made on complaint of the owner, no assessment shall be increased

without previous notice to the owner and an opportunity to be heard. When the county assessor has completed such revision and correction and entered the changes and revision in the assessment books, an affidavit shall be appended to each of such assessment books in the form required by law, signed by the county assessor. After the signing of such affidavit the county assessor shall have power, when directed by the board of appeals pursuant to Section 113 of this Act,[1] or on his own initiative, to assess properties which may have been omitted from assessments for the current year or during any year or number of years for which such property was liable to be taxed, and for which such tax has not be paid, but only on notice and an opportunity to be heard in the manner and form required by law, and shall enter such assessments upon the assessment books. *The assessor shall have no power to change the assessment or alter the assessment books in any other manner or for any other purpose so as to change or affect the taxes in that year, except as ordered by the board of appeals. The county assessor shall make all changes and corrections ordered by the board of appeals.* The county assessor may for the purpose of revision by the board of appeals certify the assessment books for any town or taxing district after or when such books are completed. Amended by P.A. 76-2254, § 1, eff. July 1, 1970. [Emphasis added.]

CHAPTER 120—ILLINOIS REVISED STATUTES

SECTION 671

COLLECTION OF TAXES—GENERAL PROVISIONS

671. Bills and receipts for taxes. § 190. Every town collector, and every county collector, in cases where there is no town collector, upon receiving the tax book or tax books, shall proceed to collect the taxes mentioned herein. *It shall*

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[1] Chapter 120, § 594.

be the duty of every county collector to prepare tax receipts in triplicate for personal property taxes and each installment of real property taxes assessed, which shall be filled out in accordance with the requirements of Section 196 of this Act,[1] *one copy of which shall be mailed by such collector at least thirty days prior to the date upon which unpaid real estate taxes become delinquent, to the owner of the property taxed, or to the person in whose name such property is taxed.* Another copy shall be used by said collector in receipting from the tax paid, and the remaining copy thereof shall be retained by such collector. There shall be printed upon each such receipt, or upon a separate slip which shall be mailed to each person assessed with the copy of the receipt hereinabove provided, a statement of the rates of the various taxes and the total tax rate. The failure of neglect of the collector to mail such receipt, or the failure or the taxpayer to receive the same, shall not affect the validity of any tax, or the liability for the payment thereof. [Emphasis added.]

THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

ARTICLE [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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[1] Section 677 of this Chapter.

APPENDIX D

DIVERSEY CORPORATION
100 W. Monroe St., Chicago, Ill. 60603, (312) 263-7756

January 7, 1972

Mr. Bernard Feinberg
5245 West Lawrence Avenue
Chicago, Illinois 60630

Dear Mr. Feinberg:

As you know, The Diversey Corporation removed the last of its equipment from the premises at 212 West Monroe Street, Chicago, Illinois on December 20, 1971. We have secured final meter readings for all utilities furnished to the premises and will pay all utiiity bills rendered for utility service through December 20, 1971.

The Diversey Corporation has done nothing which would create any mechanic's or materialmen's lien against the premises and notwithstanding the closing, Diversey will continue to indemnify you, your personal representatives and assigns against all mechanic's or materialmen's liens for work, labor or materials ordered by Diversey or incurred by it up to and including December 20, 1971.

As you know, pursuant to an understanding betwen you and Diversey, the work of stripping and demolishing the building at 212 West Monroe Street was commenced prior to December 20, 1971. Since December 20 was the date when Diversey moved the last of its equipment from the premises and since demolition had already begun prior to that date, December 20 is the date when possession was delivered and thus the date specified for prorations under Paragraph (8) of the Amendatory Agreement dated October 1, 1970 to our Real Estate Sale Agreement dated September 25, 1970 and under the terms of the last paragraph of Sec-

tion (17) of the Lease for the premises dated October 1, 1970, no rental or occupancy cost is due to you for any period subsequent to December 20, 1971 because of the commencement of such demolition.

Accordingly, we are enclosing herewith our check in the amount of $25,640.73, calculated as follows:

Proration of 1971 real estate taxes through December 20, 1971 based on 1970 tax bill in the amount of $30,172.34	$29,263.04
Refund of December rent previously paid as a credit for the period from December 21 through December 31, 1971	(3,622.31)
Balance due for which our check is enclosed	25,640.73

It is hereby agreed that, except as above stated with respect to our obligation to pay utility bills and continuing indemnity against liens, said Lease dated October 1, 1970 was terminated on December 20, 1971 and all amounts due under said Lease and all prorations called for by said Real Estate Sale Agreement, as amended, have been paid and satisfied by Diversey.

If you agree with the foregoing, please sign the enclosed copy of this letter in the space provided and return to me in the enclosed return, stamped envelope.

Yours very truly,

THE DIVERSEY CORPORATION

/s/ By: F. E. HORN
F. E. HORN, Vice President

Agreed:

/s/ BERNARD FEINBERG
BERNARD FEINBERG

Enc.

CC:
MR. M. G. BEAMER
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
39 South LaSalle Street
Chicago, Illinois 60603

MR. DAVID E. MALFAR
Room 1112
77 West Washington Street
Chicago, Illinois 60602

APPENDIX E

BERNARD FEINBERG
Real Estate
5245 West Lawrence Avenue
Chicago, Illinois 60630
Area Code 312, Phone 777-8600

January 15, 1972

Mr. F. E. Horn, Vice President
The Diversey Corporation
100 West Monroe Street
Chicago, Illinois 60603

Dear Mr. Horn:

I was greatly distressed with the contents of your letter of January 7th which arrived during my absence from the City.

Had I known that my good intentions of stopping the meter running on your company's continued expense for occupancy of the premises at 212 West Monroe Street would blow up in my face and cost me $4,000.00, I would have thought twice or three times. There was no reason to let the wrecker into your premises. There was never any understanding between me and your company that work would start before January 1, 1972 since time was not of the essence for your company to vacate the premises as this demolition work is part of four buildings on which a four month time schedule was allowed.

Further, there was no understanding at any time between myself and your company that we would take possession of these premises prior to January 1, 1972. If there is any where such a written agreement between us, I would want to examine same. Also, I never authorized the wrecker to go into these premises. Accordingly I do not agree with your proration statement as submitted. I

was unaware of the real estate taxes being prorated on the basis of a 1970 bill and 1971 is a quadrennial reassessment year for the south quadrent which is where this property is located and I am wondering if your company had filed with the Assessor's Office to determine if a fair assessment was made against the property for 1971.

Your company will be receiving within a week to ten days an official notice from the Cook County Assessor's Office as to the 1971 assessment on land and building. I have been informed unofficially that the land value has doubled on this property and I do not know what the real estate valuation could have been increased to if there was no one watching the assessment procedure on behalf of your company. Previously your company was in contact with me in connection with same and it was my understanding that your company was to employ a tax counsel to handle this assessment matter.

Please advise me if this was done and also note your records that immediately upon receipt of this official notice of assessment that it be sent on to me so that we may within the prescribed time set by law file an assessment complaint on any over assessment that may have taken place.

Please take this matter up with your Mr. Hunt and advise me accordingly.

Yours very truly,

/s/ BERNARD FEINBERG
Bernard Feinberg

BF/ls

CC: Mr. George Hunt, President
The Diversey Corporation

APPENDIX F

January 31, 1972

Mr. Bernard Feinberg
5245 West Lawrence Avenue
Chicago, Illinois 60630

Dear Mr. Feinberg:

I regret the delay in replying to your letter of January 15, but we will do so shortly.

In the meantime, enclosed is the Notice Of Assessed Valuation recently received.

With best regards.

Very truly yours,

THE DIVERSEY CORPORATION

Clarence B. Jones
Secretary and General Attorne

CBJ/ar
Enc.

CC: Mr. M. G. Beemer

CC: Mr. David E. Malfar

P.S. Also enclosed is the Certificate of Inspection for the Freight Elevator at 212 West Monroe Street.

BEST COPY AVAILABLE

THIS IS NOT A TAX BILL
SEND NO MONEY

If you have questions regarding this Notice of Assessed Valuation you may call the Office of Assessor P. J. Culleton at:
321-8920

or you may write:
P. J. Culleton
Assessor of Cook County
Dept. of Taxpayer Assistance
County Building
Chicago, Illinois 60602

VOL. 211

THE DIVERSEY CORP
212 W MONROE ST
CHICAGO IL 60603

SEE REVERSE SIDE FOR INSTRUCTIONS

NOTICE OF ASSESSED VALUATION

P. J. Culleton
Cook County Assessor

The assessed valuation for the real property described below and shown on our records is:

PERMANENT INDEX NUMBER	TOWN	LAND	IMPROVEMENTS	TOTAL ASSESSED VALUATION	
17-10-202-016-0000	SOUTH CHICAGO	142,300	202,343	344,643	1971
		90,300	179,513	269,813	1970

NOTE: If there has been a change in your Assessed Valuation it is due to: QUADRENNIAL REASSESSMENT

THIS IS NOT A TAX BILL
SEND NO MONEY

APPENDIX G

24a

VOL. NO. 511

COMPLAINANT BERNARD FEINBERG

ADDRESS

Nº 2511

FEB 21 1972

PRORATED WITH

1971

REAL ESTATE

BOARD OF APPEALS

GOVERNMENT EXHIBIT 4-2

ACTION

1	No Change	
2	Exempt	
3	Change	
3A	Change & Error Assessors Error# B. A. Change	
4	A. R.	Amount
4A	A. R. & Assessors Change B. A. Change 20243	

Index Page Line 11 Entered by

Posted by LC

Notice of Action Date Clerk

LAND

FRONT AND DEPTH	UNIT PRICE	DEPTH FACTOR	CORNER FACTOR	VALUE

Board of Appeals

County Assessor

CODE FOR LAND CHANGE

☐ 1 Unit Value High ☐ 5a Pricing Error ☐ 4 Exempt
☐ 2 Problem Error ☐ 5 Extension Error

CODE FOR BUILDING CHANGE

☐ 6 Area or Cubs Error ☐ 8 Condition ☐ 11 On Wrong Lot
☐ 6 Unit Price ☐ 9 Age and Condition ☐ 12 Extension Error
☐ 7 Class and Unit ☐ 10 Bldgs. Wrecked or Moved

IMPROVEMENTS

SQ. FT. OR VOLUME	UNIT COST	NEW COST	GOOD	FAIR	BAD	% COND.
687104 6080 550	CLASS		LACK OF UTILITY OBSOLESCENCE			AGE

GARAGE	TYPE	FLOOR	ROOF	SIZE	AREA	Unit Price	New Cost	% Cond.
SHEDS								

Member Board Appeals

Member Board Appeals

BASE PRICE
EXT. WALLS
FACE BRICK
BATH
PLUMBING
BASEMENT
BSMT. ROOMS
ATTIC ROOMS
HEAT
FIRE PL.
TYPE ROOF
L M H
ROOFING
TOTAL

Personal improvements, Bldg member

BY OWNER

ADDRESS

PHONE

Board of Appeals

County Assessor

25a

1971 REAL ESTATE ASSESSED VALUATION COMPLAINT

COMPLAINT NO: 2511

THE BOARD OF APPEALS OF COOK COUNTY

BOARD OF APPEALS ORIGINAL

TYPE OR PRINT ALL INFORMATION-PLEASE COMPLY WITH RULES & REGULATIONS IN FILLING OUT THIS FORM

Date of Hearing: FEB 26 1972

Name of Complainant: BERNARD FEINBERG

Hour of Hearing: 9 A. M.

Address of Complainant: 5245 West Lawrence Avenue

City: Chicago Tel. No. 777-8600

Received & Checked by:

LOCATION AND IDENTIFICATION OF REAL ESTATE

Address: 212 West Monroe Street City: Chicago

VOLUME NUMBER: 511 TOWNSHIP: South

PERMANENT INDEX NUMBER: 17 / 16 / 202 / 016 / 0000

STATE OF ILLINOIS } ss.
County of Cook }

The undersigned Complainant complains that the above described real estate is OVER ASSESSED by the Assessor of Cook County for the year 1971 for the following reasons (State all facts relied on to show conclusion claimed, including the below required information and all other factors supporting your complaint AGAINST THE ASSESSED VALUATION as distinguished from the TAX BILL):

Building vacated for demolition - buildings on premises wrecked.

Year Purchased or Acquired: Oct. 1970 Purchase Price or Consideration Paid: $ Amount of Original Mortgage: $

Full Description of Building(s) on Property: Five story loft building that was vacated and wrecked.

Number of Apartments Number of Stores Other

Total Monthly Income Fully Rented (Include Value of Space Occupied by Owners and Relatives) $

Improvements made, if any, since Purchased or Acquired:

Dates Improvements Made: Cost of Improvements Made: $ Amount of Fire Insurance Coverage: $

Owner's Estimate of Fair Cash Market Value of Land and Building(s) combined as of January 1, 1971: $

Owner's Estimate of Paper Assessed Valuation: $ And of amount by which Property is Allegedly Over Assessed: $ 200,000.00

ATTORNEY'S APPEARANCE

I (We) hereby enter the appearance of the Complainant

and my (our) appearance as attorney(s).

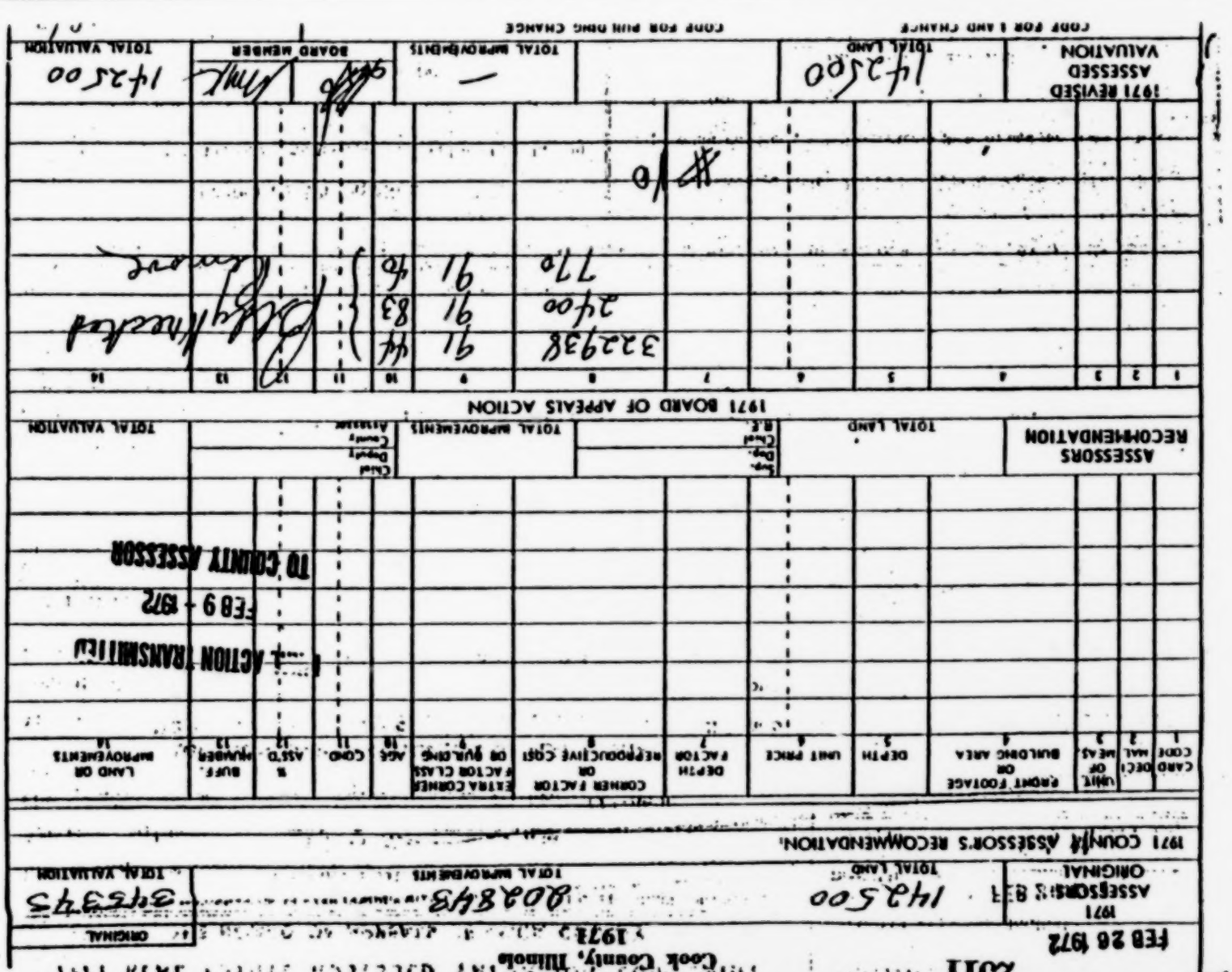
The undersigned states that he has read the above complaint, has personal knowledge of the contents thereof, and the same is true in substance and in fact.

BERNARD FEINBERG

Type or Print Name of Complainant or Attorney

26a

27a



VOL. NO. 511

COMPLAINANT BERNARD FEINBERG

ADDRESS

FEB 21 1972

No. 2512

PRORATED WITH 1

7.C.

EXHIBIT 4-3

1971

REAL ESTATE

BOARD OF APPEALS

ACTION		
1	No Change	
2	Exempt	
3	Change	
3A	Change & Error Assessors Error# B. A. Change	
4	A. R.	Amount
4A	A. R. & Assessors Change B. A. Change 26615	

Index Page 1 Line 12 Entered by JB

Posted by AC

Notice of Action Date Clerk

FRONT AND DEPTH	UNIT PRICE	DEPTH FACTOR	CORNER FACTOR	VALUE

SQ. FT. OR VOLUME	UNIT COST	NEW COST	GOOD	FAIR	BAD	% COND.
6880 318538	CLASS		LACK OF UTILITY OBSOLESCENCE			AGE

	GARAGE	TYPE	FLOOR	ROOF	SIZE	AREA	Unit Price	New Cost	% Cond.
	SHEDS								

Board of Appeals.

County Assessor.

CODE FOR LAND CHANGE

☐ 1 Unit Value High ☐ 3a Pricing Error ☐ 4 Exempt
☐ 2 Problem Error ☐ 3 Extension Error

CODE FOR BUILDING CHANGE

☐ 5 Area or Cube Error ☐ 8 Condition ☐ 11 On Wrong Lot
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Member Board Appeals

DMS

Member Board Appeals

BASE PRICE	
EXT. WALLS	
FACE BRICK	
BATH	
PLUMBING	
BASEMENT	
BSMT. ROOMS	
ATTIC ROOMS	
HEAT	
FIRE PL.	
TYPE ROOF	
L M H	
ROOFING	
TOTAL	

Garage improvements fully assessed

BY OWNER

ADDRESS

PHONE

Board of Appeals.

County Assessor.

1971 REAL ESTATE ASSESSED VALUATION COMPLAINT

THE BOARD OF APPEALS OF COOK COUNTY

COMPLAINT NO. 2512

BOARD OF APPEALS ORIGINAL

Date of Hearing FEB 26 1972

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City Chicago Tel. No. 777-8600

LOCATION AND IDENTIFICATION OF REAL ESTATE

Address 32 South Wells City Chicago

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STATE OF ILLINOIS
County of Cook ss

The undersigned Complainant complains that the above described real estate is OVER ASSESSED by the Assessor of Cook County for the year 1971 for the following reasons (State all facts relied on to show conclusion claimed, including the below required information and all other factors supporting your complaint AGAINST THE ASSESSED VALUATION as distinguished from the TAX BILL):

Building vacated for demolition - buildings on premises wrecked.

Year Purchased or Acquired: Dec. 1970 Purchase Price or Consideration Paid: $ Amount of Original Mortgage: $

Full Description of Building(s) on Property: Five story loft building that was vacated and wrecked.

Number of Apartments Number of Stores Other

Total Monthly Income Fully Rented (Include Value of Space Occupied by Owners and Relatives) $

Improvements made, if any, since Purchased or Acquired:

Dates Improvements Made: Cost of Improvements Made: $ Amount of Fire Insurance Coverage: $

Owner's Estimate of Fair Cash Market Value of Land and Building(s) combined as of January 1, 1971: $

Owner's Estimate of Proper Assessed Valuation: $ And of amount by which Property is Allegedly Over Assessed: $26,615.00

ATTORNEY'S APPEARANCE

I (We) hereby enter the appearance of the Complainant

and my (our) appearance as attorney(s).

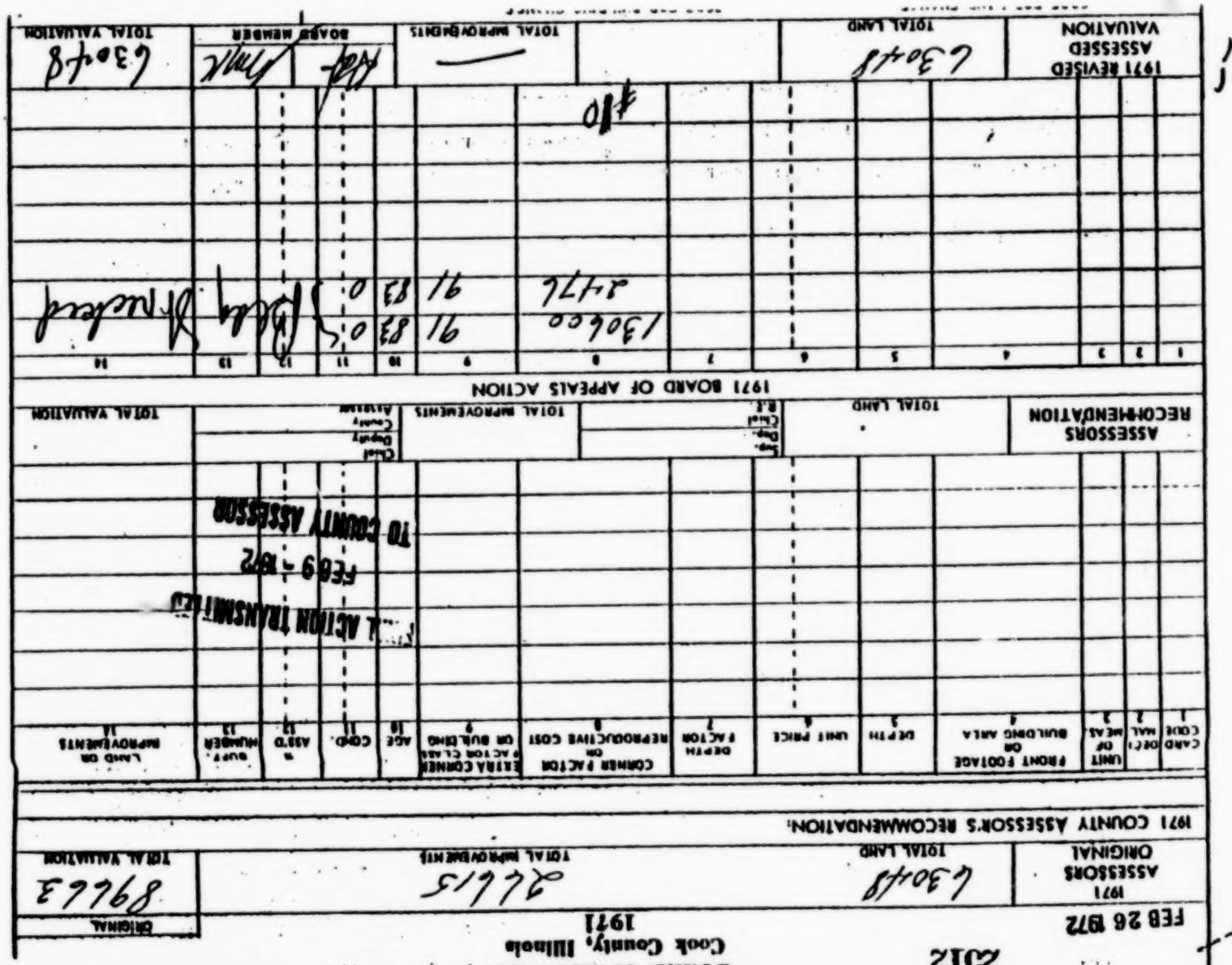
Dated:

The undersigned states that he has read the above complaint, has personal knowledge of the contents thereof, and the same is true in substance and in fact.

BERNARD FEINBERG

Type or Print Name of Complainant on this Line

30a



31a

CITY OF CHICAGO-DEPARTMENT OF BUILDINGS — PERMIT NO. B 451785

PERMIT NO.	WK. CD.	PLAN	LOCATION	DESCRIP. OF WORK		DO NOT TYPE IN THIS SPACE
451785	18086	FILE	210 12 W. MONROE	32 513 0617711	1	
DESCRIPTION OF WORK: WRECK ONE 5 STY BR OFFICE BLDG.' 50 FT FRONTAGE					2	
MASON	PLUMB.	HEATING	OWNER'S NAME AND ADDRESS: CHICAGO TITLE & TR CO.' TR 56000 111 W WASHINGTON		3	

D	BLD U	UNITS	CARS	COST OF WORK	SCHEDULE OF FEES (SEE BELOW FOR EXPLANATION OF CODES)										TOTAL FEES
					CD.	FEE	CD.	FEE	CD.	FEE	CD.	FEE	CD.	FEE	
	1						22	2600							26.00

BUILDING DESCRIPTION

NO.	STYS.	BSMT.	W.	L.	H.	NO.	STYS.	BSMT.	W.	L.	H.	NO	STYS.	BSMT.	W.	L.	H.

LEGAL DESCRIPTION:

EXPLANATION OF FEE CODES:
21 - ELECTRICAL; 22 - BUILDING; 23 - PLUMBING; 24 - ELEVATORS; 26 - TANKS; 27 - FURNACE; 28 - SMOKE ABATE.; 29 - WATER; 25 - HEATING, VENTILATING

ARCHITECT'S NAME AND ADDRESS

CONTRACTOR'S NAME AND ADDRESS: NATIONAL WRECKING 1231 W.' 42ND ST.'

PLUMBING CONTRACTOR'S NAME AND ADDRESS

VENTILATION OR FURNACE CONTRACTOR'S NAME AND ADDRESS

PERMISSION is hereby granted the above named person or firm to construct buildings and do other work as indicated in the schedule hereon, at the location shown. All work is to be done in accordance with approved plans and the ordinances of the City of Chicago, and this permit may be revoked at any time for violation of the ordinances in connection with work herein authorized.

APPROVED PLANS AND PERMIT SHALL BE KEPT ON FILE AT THE CONSTRUCTION SITE WHILE THE WORK IS IN PROGRESS (SEC. 43-10). IF WORK DOES NOT START WITHIN SIX MONTHS OF THE DATE OF THIS PERMIT, THE PERMIT SHALL BECOME VOID. (SEC. 43-9).

John D. O'Gorman
COMMISSIONER OF BUILDINGS

Received amount indicated hereon
Lawrence Kunkel
CITY COLLECTOR

Any person violating, or resisting, or opposing the enforcement of any of the provisions of the Code pertaining to permits shall be fined not less than $25.00 nor more than $200.00 for each offense. Each day such violation shall continue shall constitute a separate and distinct offense; and any builder or contractor who shall construct any building in violation of the provisions of the City Code, and any architect who shall design, draw plans for, or have supervision of such building, or who shall permit it to be constructed, shall be liable for the penalties provided by this section.

THIS PERMIT DOES NOT INCLUDE THE ELECTRICAL INSTALLATION OR SERVICE WHICH MUST COMPLY WITH SEC. 43-4 AND CHAPTERS 36-87-88 OF THE CHICAGO MUNICIPAL CODE.

PURCHASER

APPENDIX I

CITY OF CHICAGO-DEPARTMENT OF BUILDINGS — PERMIT NO. B 451784

PERMIT NO.	WK. CD.	PLAN	LOCATION	DESCRIP. OF WORK		DO NOT TYPE IN THIS SPACE
451784	18086		30 S WELLS	32 513 0617711	1	
DESCRIPTION OF WORK: WRECK ONE 3 STY BR OFFICE BLDG.' 50 FT FRONTAGE					2	
MASON	PLUMB.	HEATING	OWNER'S NAME AND ADDRESS: CHICAGO TITLE & TRUST TR 56000 111 W WASHINGTON		3	

D	BLD U	UNITS	CARS	COST OF WORK	SCHEDULE OF FEES (SEE BELOW FOR EXPLANATION OF CODES)										TOTAL FEES
					CD.	FEE	CD.	FEE	CD.	FEE	CD.	FEE	CD.	FEE	
	1						22	2600							26.00

BUILDING DESCRIPTION

NO.	STYS.	BSMT.	W.	L.	H.	NO.	STYS.	BSMT.	W.	L.	H.	NO	STYS.	BSMT.	W.	L.	H.

LEGAL DESCRIPTION:

EXPLANATION OF FEE CODES:
21 - ELECTRICAL; 22 - BUILDING; 23 - PLUMBING; 24 - ELEVATORS; 26 - TANKS; 27 - FURNACE; 28 - SMOKE ABATE.; 29 - WATER; 25 - HEATING, VENTILATING

ARCHITECT'S NAME AND ADDRESS

CONTRACTOR'S NAME AND ADDRESS: NATIONAL WRECKING 1231 W.' 42ND ST

PLUMBING CONTRACTOR'S NAME AND ADDRESS

VENTILATION OR FURNACE CONTRACTOR'S NAME AND ADDRESS

PERMISSION is hereby granted the above named person or firm to construct buildings and do other work as indicated in the schedule hereon, at the location shown. All work is to be done in accordance with approved plans and the ordinances of the City of Chicago, and this permit may be revoked at any time for violation of the ordinances in connection with work herein authorized.

APPROVED PLANS AND PERMIT SHALL BE KEPT ON FILE AT THE CONSTRUCTION SITE WHILE THE WORK IS IN PROGRESS (SEC. 43-10). IF WORK DOES NOT START WITHIN SIX MONTHS OF THE DATE OF THIS PERMIT, THE PERMIT SHALL BECOME VOID. (SEC. 43-9).

John D. O'Gorman
COMMISSIONER OF BUILDINGS

Received amount indicated hereon
Lawrence Kunkel
CITY COLLECTOR

Any person violating, or resisting, or opposing the enforcement of any of the provisions of the Code pertaining to permits shall be fined not less than $25.00 nor more than $200.00 for each offense. Each day such violation shall continue shall constitute a separate and distinct offense; and any builder or contractor who shall construct any building in violation of the provisions of the City Code, and any architect who shall design, draw plans for, or have supervision of such building, or who shall permit it to be constructed, shall be liable for the penalties provided by this section.

THIS PERMIT DOES NOT INCLUDE THE ELECTRICAL INSTALLATION OR SERVICE WHICH MUST COMPLY WITH SEC. 43-4 AND CHAPTERS 36-87-88 OF THE CHICAGO MUNICIPAL CODE.

PURCHASER

APPENDIX J

Supreme Court, U. S.
FILED
OCT 1 1976
MICHAEL RODAK, JR., CLERK

No. 76-204

In the Supreme Court of the United States

OCTOBER TERM, 1976

BERNARD FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-204

BERNARD FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the mailings on which his mail fraud conviction was based were not mailed, caused to be mailed, or received from the mails for the purpose of executing the fraudulent scheme.

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of four counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to six months' imprisonment on the first count.The district court suspended imposition of sentence on the remaining counts in favor of three years' probation, as a condition of which petitioner was required to make restitution in the amount of $25,000 to the county treasurer. The court of appeals affirmed (Pet. App. A).

There is no essential dispute concerning the underlying facts relating to the issue raised by the petition. These facts are accurately summarized in the opinion of the court of appeals (Pet. App. 2a-6a). Petitioner was the beneficial owner as a conditional sale vendee of two parcels of real estate containing buildings from which he received rental income. He conceived a scheme to defraud the county by having the property assessed for the year 1971 at less than actual value. He received demolition permits for the buildings on November 17, 1971, and actual demolition was carried out during February 1972. He presented the county assessment appeals board, however, with claims of overassessment that he substantiated with demolition permits bearing the forged date of June 17, 1971. As a result, he received reduced assessments (based on the asserted removal of improvements to the parcels), which lowered his taxes by $24,000 for one parcel and $3,500 for the other. His presentation to the appeals board was made in person on February 2, 1972.

The four mailings counts upon which petitioner was convicted were based upon: (1) a letter that he mailed to the conditional sale vendor of one of the parcels on January 15, 1972, requesting that the latter, upon receipt of the official assessment notice, send it to him so that a complaint could be filed for any overassessment;[1] (2) a letter to him from the conditional sale vendor dated January 31, 1972, enclosing the assessment notice; (3) and (4) the official tax bills (after assessment had been reduced) for the two parcels, mailed to him as required by law by the county treasurer in April 1972.

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[1]The letter also complained of the vendor's proposed proration of taxes and expenses and took the vendor to task for failing to monitor the county's assessment procedure (see Pet. App. E).

The court of appeals correctly held that all four mailings were for the purpose of executing the fraudulent scheme. As the trier of fact, the district court properly found (see Pet. App. 13a) that the scheme came into being prior to the date upon which petitioner first wrote to the conditional sale vendor. Since it was necessary for him to know the amounts at which his property had been assessed in order to make his fraudulent claims for reassessment, his letter to the vendor and the latter's reply were necessary steps in the scheme. It is immaterial that, as he contends (Pet. 16), he could have obtained the necessary information in other ways; he in fact obtained it through use of the mails. Similarly, while he obtained his fraudulently procured reassessment on February 2, 1972, the scheme did not come to full fruition until he obtained the financial benefits he was seeking—understated tax bills. Hence, his receipt of the officially mailed tax bills were also steps in the scheme to defraud. "It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira* v. *United States*, 347 U.S. 1, 8. It is enough that there were mailings for the purpose of executing this scheme.

The mailings were thus not wholly tangential to the scheme, as were the mailings in *Parr* v. *United States*, 363 U.S. 370, *United States* v. *Maze*, 414 U.S. 395, and *Kann* v. *United States*, 323 U.S. 88. In *Parr*, the scheme involved fraudulent conversion of local government funds; while the mailings were, as in this case, required to be made by law, they were valid tax assessments, tax bills, and payments of taxes, not—as here—tax bills that were lower than they should have been because of petitioner's fraudulent scheme. In *Maze* and *Kann*, the mailings occurred after the defendants had received the fruits of their fraudulent schemes; here, in contrast, the mailings triggered the scheme and brought to petitioner its fruits.

The mailings, in short, were not "immaterial" to the execution of the scheme (*United States* v. *Maze, supra,* 414 U.S. at 401), but rather were directly related to it.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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[2]Petitioner's sentence of three years' probation on the two counts involving the mailings of the tax bills is concurrent with the sentence on the count involving the mailing of the assessment notice to him by the vendor (see p. 1, *supra*). To the extent that petitioner's contentions focus on the tax bill mailings, this Court may decline to consider them. *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.